



## INDEPENDENT SECTOR

*Advancing the common good  
by leading, strengthening, and  
mobilizing the independent sector.*

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June 27, 2005

Federal Trade Commission  
Office of the Secretary  
CAN-SPAM Act  
Post Office Box 1030  
Merrifield, VA 22116-1030

RE: CAN-SPAM Act Rulemaking, Project No. R411008

Dear Sir or Madam:

INDEPENDENT SECTOR (IS), a nonprofit, nonpartisan coalition of nearly 500 national organizations, foundations, and corporate philanthropy programs, welcomes this opportunity to comment on the Notice of Proposed Rulemaking with respect to the CAN-SPAM Act (Project No. R411008) published in the May 12, 2005 Federal Register.

First, IS would like to commend the Commission for clarifying that the definition of a Valid Physical Postal Address includes a post office box or private registered mailbox. In comments to the FTC dated April 20, 2004, INDEPENDENT SECTOR urged permitting commercial email from nonprofit organizations to use such addresses because some human service organizations (e.g., domestic violence shelters or agencies serving asylum seekers) have security concerns that make listing a street address unwise. We are pleased to see that our concern has been addressed in the proposed rule.

Three areas of the proposed rule, however, are troubling to us:

- the 3-day business period for honoring opt-outs;
- the “inducement” interpretation in the tell-a-friend scenario; and
- the question about lapsed members being included in the “transactional or relationship” message.

### **Three-Day Business Period for Opt-Out Requests**

The CAN-SPAM Act requires senders of commercial email message to honor a recipient’s opt-out request within **ten** days of receiving it. The FTC is now proposing to shorten the time period for honoring opt-outs from ten business days to **three** business days. We recognize that the Act gives the Commission the authority to modify the ten-day-business rule if it “determines that a

different time frame would be more appropriate,” but we believe compliance with this shorter time period will be very difficult for nonprofit organizations since 64% of 501(c)(3)s have operating budgets of under \$500,000 a year. Smaller charities, and even mid-sized ones, do not have the personnel, technical infrastructure or financial resources to implement a three-day turnaround. Most do not have on-site IT departments and many rely on part-time employees or volunteers to input data and maintain mail and email lists.

INDEPENDENT SECTOR previously urged the Commission (in April and September of 2004) to adopt a more workable 30-day time period for processing opt-out requests because of the extreme burden it will place on nonprofit organizations that lack the resources to purchase the latest software for processing opt-outs and/or the personnel to set-up and run the system. Software products that **automatically** process opt-out requests are usually only available as part of larger applications that manage bulk mailing. Such applications are not widely used in small organizations because they are expensive to acquire and, more importantly, are complex and costly to operate. In addition to the software acquisition cost, initial setup expenses for automated opt-out programs can include purchasing hardware servers, database expertise and IT support for installation and configuration. These costs run into the tens of thousands of dollars, well out of reach for most small and many mid-size organizations.

Because of the expense of automated opt-out processing systems, most small organizations continue to process email lists **manually**. For these organizations each returned email message is sent to an email box and must be read individually by a human being. Returned email includes bounce-backs, bad e-mails addresses, opt-outs, and out-of-office replies. Once opt-outs are identified they are then manually found and removed from the original lists that resulted in the response. Suppressing an email address from the organization's directory or distribution list also involves searching through various lists used by different departments within the organization. Even if the organization maintains a single list they must manually read the remove requests and either delete the entries or mark them as excluded from specific email campaigns.

**For these reasons, INDEPENDENT SECTOR again urges the Commission to adopt a more workable 30-day time period for processing opt-out requests, at least for nonprofit organizations, because of the extreme burden and costs compliance with a shorter time frame would entail.**

### **Forward to a Friend Scenarios**

The proposed rule addresses situations in which the sender of a commercial email pays, rewards, or otherwise “intentionally induces” a recipient to forward the message on to others. In these cases, the original sender is still responsible for honoring opt-outs from the ultimate recipients. According to the statute, if a message is forwarded by “routine conveyance” the original sender will not be responsible for honoring opt-outs from recipients of the forwarded message.

We agree with the Commission’s assessment that simply making the means available for forwarding such a message with a “click here to forward” mechanism would **not** constitute “inducing” the forwarding of the email message (70 Fed. Reg. 25441). We are concerned, however, that the Commission considers the commonplace “tell a friend” message (such as the

one below) an intentional inducement and would require the original sender to honor opt-outs from the ultimate recipients:

“Tell-A-Friend—Help spread the word by forwarding this message to friends! To share this message with a friend or colleague, click the ‘Forward e-mail button.’”

INDEPENDENT SECTOR believes that a simple message such as the one above is a “routine conveyance” which neither procures nor induces further transmission of the email to which it refers. The original recipient may or may not forward the message to others; the nonprofit that sent it has no control over the recipient’s actions. Whether or not the original recipient forwards the email to others, he or she receives no benefit or remuneration. Including a “tell a friend” message in a nonprofit email should not extend the legal opt-out obligation beyond the first transmission.

**IS urges the FTC to classify a “Tell a Friend” message as a routine conveyance and not as an intentionally induced communication.**

### **Lapsed Members**

The Commission asks whether messages to lapsed members should be considered “transactional or relationship” in nature and, therefore, excluded from most requirements for commercial email (70 Fed. Reg. 25432). It is INDEPENDENT SECTOR’s experience that some members need several reminders before they send in their membership renewal information, even though they fully intend to renew. **IS believes that messages to these entities are still “transactional or relationship” in nature and should be excluded from the definition of commercial email for 12 months after membership lapses.**

Electronic communications are an invaluable way for nonprofit organizations to educate and connect with members, supporters, and others who have shown an interest in their missions. While we understand the need to combat spam and other unwanted commercial communications, we urge the Commission to consider the unique role of charitable organizations and the services they provide in communities all across the country. We want to ensure that nonprofits’ communications are not unduly hampered by the implementation of a law designed to combat commercial emails from a completely different type of entity.

Again, we thank you for this opportunity to offer comments.

Sincerely,

Patricia Read  
Senior Vice President, Public Policy and Government Relations  
INDEPENDENT SECTOR